

87-1740

Supreme Court, U.S.

FILED

APR 20 1988

JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
Supreme Court of the United States

October Term, 1987

STATE OF NEW JERSEY,

Respondent,

v.

JOSEPH P. POLLIO,

Petitioner.

PETITION OF JOSEPH P. POLLIO FOR WRIT OF
CERTIORARI TO THE SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION

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On the Brief

QUESTIONS PRESENTED

1. Whether the original jury, having deliberated 8 hours 50 minutes over two days in a case involving one incident of alleged sexual contact in which the primary issue was the credibility of the victim as against that of the defendant, had reached an advanced stage of deliberations so that the likelihood that deliberations would truly begin anew was so remote as to foreclose juror substitution?

2. If the juror substitution was proper under the facts presented in this case, did the minimal period of the reconstituted jury's deliberations (*i.e.*, 2 hours 9 minutes), when compared to the period of the original jury's deliberations (*i.e.*, 8 hours 50 minutes), demonstrate that defendant was, in fact, prejudiced by the substitution?

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STATE OF NEW JERSEY,
Respondent,
v.

JOSEPH P. POLLIO,
Petitioner.

— o —

**PETITION OF JOSEPH P. POLLIO FOR WRIT OF
CERTIORARI TO THE SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION**

— o —

Petitioner Joseph P. Pollio (“defendant”) respectfully prays that a writ of *certiorari* be issued to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division (“Appellate Division”) entered in this matter on October 13, 1987.

— o —

OPINION BELOW

The opinion of the Appellate Division is unreported. It is set out in the appendix. (App. 1-3).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Appellate Division was entered on October 13, 1987. On February 17, 1988, the Supreme Court of New Jersey entered its order denying defendant's petition for certification. (App. 4). This petition for writ of *certiorari* has been filed within 60 days thereafter pursuant to 28 *U.S.C.* § 2102(d) and Supreme Court Rule 20.1. The jurisdiction of this court is invoked in accordance with 28 *U.S.C.* § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment VI of the United States Constitution, which provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for defence.

STATEMENT OF THE CASE

On May 16, 1986 after a jury trial before the Superior Court of New Jersey, Law Division, Criminal Part, defendant was found guilty of sexual assault (*N.J.S.A.* 2C:14-2c(1)) and criminal restraint (*N.J.S.A.* 2C:13-2a) and was

acquitted of aggravated sexual assault (*N.J.S.A.* 2C:14-2a (6)). He was sentenced on September 23, 1986 to concurrent presumptive custodial terms of seven and four years respectively.

The trial below commenced on May 7, 1986 and, after four and one-half days of testimony, the original jury commenced its deliberations at 2:55 p.m. on May 14, 1986. At that time, the two alternate jurors were sequestered apart from the jury pending the completion of the deliberations.

The original jury deliberated for 8 hours 50 minutes over a period of two days without reaching a verdict. Prior to the commencement of deliberations on the third day, the trial judge granted the State's motion to discharge one of the jurors for cause over defendant's objection.¹

The discharged juror was replaced by one of the alternates and, after the defendant's motion for a mistrial was denied, the reconstituted jury was directed to begin its deliberations anew.² It deliberated only 2 hours 9 minutes before announcing its verdict.

¹ During the evening of the second day of deliberations, the juror approached a member of defense counsel's firm at a bowling alley and asked the attorney if he would answer a legal question for him. The juror was unaware that the attorney was a member of defense counsel's firm. However, the attorney immediately realized that the juror was sitting on this case and terminated the conversation. Based upon the foregoing, the trial judge granted the State's motion to discharge the juror.

² In addition to his trial objections, defendant presented the juror substitution issues to the Appellate Division. (See App. 2-3).

The chronology of the deliberations is as follows:

ORIGINAL JURY

May 14, 1986

Commencement of deliberations	2:55 p.m.
Jury excused for the day	4:55 p.m.
Elapsed time	2 hours 0 minutes

May 15, 1986

Resumption of deliberations	9:11 a.m.
Request for instructions	11:35 a.m.
Elapsed time	2 hours 24 minutes
Resumption of deliberations	11:40 a.m.
Jury excused for lunch	12:30 p.m.
Elapsed time	0 hours 50 minutes
Resumption of deliberations	1:42 p.m.
Jury excused for the day	5:18 p.m.
Elapsed time	<u>3 hours 36 minutes</u>
Total time of deliberations	8 hours 50 minutes

RECONSTITUTED JURY

May 16, 1986

Commencement of deliberations	10:13 a.m.
Announcement of verdict	12:24 p.m.
Elapsed time	<u>2 hours 9 minutes</u>
Total time of deliberations	2 hours 9 minutes

ARGUMENT

"It is of course settled that in all serious criminal cases, state or federal, the sixth and fourteenth amendments to the [federal] Constitution entitle the accused to a trial by jury. *Johnson v. Duckworth*, 650 F.2d 122, 124 (7th Cir. 1981) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491, 500 (1968)). "To determine whether a certain feature of a jury system comports with constitutional requirements, 'the relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial.' *Williams v. Florida*, [399 U.S. 78, 99-100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446, 459-60 (1970)]. States [*sic*] another way, where a state's practice 'presents a . . . threat to preservation of the substance of the jury trial guarantee,' *Burch v. Louisiana* [441 U.S. 130, 138, 99 S.Ct. 1623, 1628, 60 L.Ed.2d 96, 103 (1979)], it must be struck down." *Johnson* at 124.

In *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 475 U.S. 1136 & 1149 U.S. 906, 102 S.Ct. 2965 & 103 S.Ct. 208, 73 L.Ed.2d 1354 & 74 L.Ed.2d 166 (1982), the Fifth Circuit upheld the facial constitutionality of criminal juror substitution under the federal Constitution in reliance upon the reasoning of the California Supreme Court in *People v. Collins*, 17 Cal.3d 687, 131 Cal. Rptr. 782, 552 P.2d 742 (1976), *cert. den.*, 492 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796 (1977), "that a defendant's fundamental right to a unanimous verdict by a twelve-person jury is not violated where the jury is instructed to begin anew with its entire process of deliberation and where the substituted alternate juror participates

fully in those deliberations.' Phillips at 992 n.17 (emphasis added). See *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982); *United States v. Barone*, 83 F.R.D. 565, 571 n.1 (S.D. Fla. 1979).

The California Supreme Court in *People v. Collins* noted that, although the question in that case was controlled by the state constitution, the result reached satisfied minimum federal constitutional standards. 131 Cal.Rptr. at 785 n.3, 552 P.2d at 745 n.3. The court discussed in depth the defendant's right to trial by jury in the context of substitution of alternates. The court stated that the essential elements of that right included the requirement that the jury consist of twelve persons and that it reach a unanimous verdict. Those elements were viewed by the court as constituent parts of a broader right requiring that each of the twelve jurors engaged in all of that jury's deliberations. The court stated:

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. [Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations.] The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all

the evidence and the argument and who together have deliberated to unanimity.

Id. 131 *Cal.Rptr.* at 786, 552 *P.2d* at 746. The court concluded that a defendant's fundamental right to a unanimous verdict by a twelve-person jury is not violated where the jury is instructed to begin anew with its entire process of deliberation and where the substituted alternate juror participates fully in those deliberations. [*Phillips* at 992 n.17].

The excerpt above from *Collins* relied upon by the Fifth Circuit has also been adopted by the New Jersey Supreme Court as the "controlling rationale" of its criminal juror substitution rules. *State v. Corsaro*, 107 *N.J.* 339, 349-50 (June 23, 1987); *State v. Trent*, 79 *N.J.* 251, 256 (1979). Thus, the same elements of collectivity and mutuality in the jury deliberative process, *i.e.*, the full participation of the alternate juror, are constitutionally required by both the United States and New Jersey Constitutions.

The issues of criminal juror substitution are best understood in the context of "the integrity of jury deliberations and the continuing condition of collectivity and mutuality among the individual jurors as integral aspects of the deliberative process within the jury. *To allow juror substitution at an advanced stage of deliberations would be to sanction a rift in the collectivity and mutuality of the jury's deliberations and to impose precisely the kind of extraneous influence upon the deliberative process that [is] forbidden.*" *Corsaro* at 350-51 (emphasis added).

In both *Corsaro* and *State v. Miller*, 79 *N.J.* 392 (1978), the New Jersey Supreme Court expressed its concern "that if the jury deliberates for an extended period of time, it will have progressed so far in its deliberations that it will

have reached determinations. Hence, at that juncture, the substituted juror will not have "had the benefit of the deliberations of the other 11, [citations omitted], and may indeed be pressured by the amount of time the jury had deliberated and by the extent of their progress to conform to their findings and verdict." *Corsaro* at 351.

The integrity of jury deliberations is at stake whenever a trial court considers the substitution of a juror after deliberations have commenced. The New Jersey Supreme Court has adopted the following standard for trial courts to apply in order to determine whether juror substitution in a particular case would violate the defendant's federal and state constitutional guarantees of a fair and impartial trial by jury:

What *Miller* and *Trent* contemplate and caution against . . . is the substitution of a juror in a situation where the presumption that jurors follow instructions is unreasonable or untenable. Thus, where the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated. [*Corsaro* at 352].

The trial below was not complex. There was only one defendant, one victim, and one incident between them for the jury to consider. Since there were no eyewitnesses

and defendant denied having sexually assaulted or criminally restrained the victim, the deliberations hinged upon the jury's evaluation of their credibility as witnesses. The original jury deliberated over this issue for 8 hours 50 minutes over a period of two days without returning a verdict.

Immediately prior to the commencement of deliberations on the third day, a juror was discharged and replaced by an alternate over defendant's objection in accordance with New Jersey Court Rule 1:8-2(d), which provides, *inter alia*, that "[i]f the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or a juror is discharged by the court because he is ill or otherwise unable to continue, the court *may* direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged." (emphasis added). "The rule is discretionary with the trial court because a situation might arise where it would be unwise to utilize this procedure. The longer the period of time the jury deliberates, the greater the possibility of prejudice should a juror be substituted or replaced." *Miller*, 76 N.J. at 407. See *Corsaro* at 348-49 (quoting *Miller*).

The length of time that the original jury deliberated over the credibility of the victim as against that of defendant, *i.e.*, 8 hours 50 minutes, strongly suggests that many, if not all, of the jurors had made actual fact-findings or reached determinations of guilt or innocence. Therefore, it was unreasonable and an abuse of the trial court's discretion for it to presume that the alternate juror would have a fair opportunity to express his views, persuade others, or understand and share completely in the delib-

erations that brought the other jurors to particular determinations.

Rather, the circumstances were such that the alternate juror was likely to be confronted by closed or closing minds and "be pressured by the amount of time the jury has deliberated and by the extent of their progress to conform to their findings and verdict." *Corsaro* at 351. Since the original jury had reached an advanced state of its deliberations, "the likelihood that deliberations would truly 'begin anew' was so remote . . . as to foreclose juror substitution." *Id.* at 354.

The reconstituted jury was instructed by the trial court to "[b]egin [its] deliberations again as if [the jury was] now entering the jury room for the first time directly after listening to [the court's] charge." However, it returned a verdict after only 2 hours 9 minutes of deliberations, thereby demonstrating the fact that deliberations had *not* "begun anew" and that the substitution had destroyed the collectivity and mutuality of the jury's deliberations.

In *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), the Wisconsin Supreme Court held that the juror substitution in that case had prejudiced the defendant. Its analysis of the periods of each of the juries' deliberations was as follows:

The eleven regular jurors in this case were exposed to the influence of the discharged juror for a somewhat longer period of time than they were exposed to the substituted alternate juror. The longer the period of time the jury deliberates before substitution and the shorter the time of jury deliberation after substitution, the greater the possibility of preju-

dice by the substitution. In this case the jury deliberated one hour and thirty-five minutes before substitution and one hour and twenty-one minutes after.

* * *

The total time that the alternate juror spent with the jury in the instant case, one hour and twenty-one minutes, gives no clear indication whether or not the jurors began deliberations anew when the alternate juror joined them or whether they gave conscientious, careful reconsideration to all the facts of the case. [321 N.W.2d at 223-24].

In *Bulls v. United States*, 490 A.2d 197 (D.C. App. 1985), the District of Columbia Court of Appeals held that the defendant had been prejudiced by the juror substitution for the following reasons:

The jury's first deliberation took about 40 minutes; the second, about 68 minutes. From all appearances, the alternate missed a significant portion of the deliberations, and thus we cannot be sure that the reconstituted jury began deliberations anew, untainted by the original participation of juror number seven or by coercion of the late arriving alternate. Absent a voir dire of all the jurors at the time of the substitution, there was no basis for the trial court's conclusion that they had not begun substantial deliberations the first day. [Citations omitted]. Nor did the court instruct the jury, in any event, to begin its deliberations anew. Nor finally did the reconstituted jury's deliberations take long enough to imply a fresh start. [490 A.2d at 202].

Federal Rule of Criminal Procedure 24(c) provides, *inter alia*, that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." In *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), the Ninth Circuit concluded that

this requirement is mandatory. Therefore, it reversed the reconstituted jury's verdict of guilty because an alternate should not have been available to replace the discharged juror.

However, the Ninth Circuit noted the obvious coercive effect suggested by the dichotomy between the length of the original jury's deliberations and the length of the reconstituted jury's deliberations as follows:

That impermissible coercion upon the alternate juror in this case was manifestly inherent, and that there was not the conscientious, careful reconsideration by the twelve of the newly constituted jury would seem apparent from the fact that, despite the district judge's instruction to the jury to "begin at the beginning," a jury that had required almost four hours to reach its initial verdict [which the judge refused to accept because of his belief that the verdict was inconsistent with his instructions] needed, after being reconstituted, only twenty-nine minutes to find the appellant guilty a second time. (Footnote omitted). [*Lamb* at 1156].

The original jury below deliberated for 8 hours 50 minutes. The reconstituted jury deliberated 2 hours 9 minutes. However, in both *Lehman* and *Bulls*, the courts found that the defendants were prejudiced by the relatively short and equal periods of their juries' deliberations. Furthermore, the difference in the deliberative periods is analogous to that which was found to be inherently prejudicial by the Ninth Circuit in *Lamb*.

"The most substantial concern about substitution of an alternate juror after deliberations have begun is that the alternate might be coerced by jury members who might have already formulated positions or viewpoints or opin-

ions.” *Phillips*, 664 F.2d at 995. “Extreme precautions” are necessary in order to negate “any possible coercive effect or any undue influence.” *Id.* at 996. In *Lehman*, the Wisconsin Supreme Court summarized these procedures and other critical factors as follows:

In those cases in which courts have concluded that substitution of an alternate juror during jury deliberations may be permitted, one or more of the following factors existed: (1) The trial was of significant duration; (2) the parties expressly and intelligently consented to the substitution; (3) the trial court questioned the alternate juror to determine whether he or she had been prejudiced after the jury began deliberations; (4) the trial court exhaustively questioned each juror as to his or her willingness to begin deliberations anew, giving due consideration to the views of the other jurors, including those of the alternate jurors; and (5) the trial court instructed the jury to set aside prior deliberations and to begin deliberations anew. [321 N.W.2d at 224].

In the instant case, the only precaution taken or factor present is that the trial court instructed the jury to begin its deliberations anew. In the absence of the employment of any of the other potential procedural mechanisms available to the trial court to obviate the potential danger of prejudice to the defendant and given the short duration of the reconstituted jury’s deliberations, it is respectfully submitted that the juror substitution in this case violated defendant’s federal constitutional guarantee of the right to a fair and impartial trial by jury.

CONCLUSION

For all of the foregoing reasons, defendant respectfully submits that a writ of *certiorari* should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Attorneys for Petitioner
Joseph P. Pollio

Dated: April 18, 1988

APPENDIX

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-978-86T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

JOSEPH POLLIO,
Defendant-Appellant.

(Filed Oct. 13, 1987)

Argued September 21, 1987—Decided Oct. 13, 1987.

Before Judges Petrella, Baime and Ashbey.

On appeal from Superior Court of New Jersey, Law
Division, Monmouth County.

Steven E. Nelson argued the cause for appellant
(Karsic, Stone & Susser, attorneys; Mr. Nelson, on the
brief).

Linda K. Calloway, Deputy Attorney General, argued
the cause for respondent (W. Cary Edwards, Attorney
General, attorney; Ms. Calloway, on the brief).

PER CURIAM

Following a lengthy jury trial, defendant was found
guilty of sexual assault (*N.J.S.A.* 2C:14-2c(1)) and crim-
inal restraint (*N.J.S.A.* 2C:13-2a) and was acquitted of
aggravated sexual assault (*N.J.S.A.* 2C:14-2a(6)). He
was sentenced to concurrent presumptive custodial terms
of seven and four years respectively. In addition, defend-

App. 2

ant was assessed penalties totaling \$50 payable to the Violent Crimes Compensation Board.

On appeal, defendant contends that: (1) the trial judge erred when he refused to charge the jury on the lesser-included offenses of sexual contact and simple assault, (2) there was insufficient evidence to support submission of the charge of aggravated sexual assault to the jury, (3) the judge abused his discretion by substituting a juror during the course of deliberations and by refusing to order a mistrial, (4) the judge mistakenly exercised his discretion when he denied the request for a jury view, (5) the verdict was against the weight of the evidence and (6) the judge erred by imposing the presumptive sentence for sexual assault.

Our thorough review of the record convinces us that all of defendant's arguments are clearly without merit. *R.2:11-3(e)(2)*. We affirm. We merely add the following brief comments concerning defendant's argument that the judge erred when he substituted an alternate for a sitting juror during the course of the jury's deliberations.

At the outset, we are entirely satisfied that the judge properly exercised his discretion in excusing the sitting juror. Contrary to the judge's repeated admonitions and instructions, the juror sought outside advice and information concerning the charges. The judge properly questioned the juror out of the presence of the remaining jurors and concluded that the deliberate and flagrant violation of his instructions required immediate action. We are fully convinced that the judge acted wisely and prudently in deciding to excuse the juror.

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We are also convinced that the judge conscientiously exercised his discretion by denying defendant's request for a mistrial and substituting the alternate for the sitting juror. The applicable principles are set forth in *State v. Trent*, 79 N.J. 251 (1979) and *State v. Miller*, 76 N.J. 392 (1978) and need not be repeated here. Suffice it to say, we are convinced, as was the trial judge, that the deliberative process had not progressed for such a length of time or to such a degree that the reconstituted jury could not begin deliberations anew. See *State v. Trent*, *supra*, 79 N.J. at 256-257. Distinguishable on this basis is *State v. Corsaro*, 107 N.J. 339 (1987), where our Supreme Court found plain error in the substitution of an alternate for a sitting juror after a partial verdict had been rendered. *Id.* at 352-354. In sum, we are fully persuaded that the trial judge properly applied R.1:8-2(d) and we, thus, have no occasion to disturb his discretionary determination.

Accordingly, the judgment of convictions is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Jack G. Trubenbach
Clerk of the Appellate Division

SUPREME COURT OF NEW JERSEY

C-600 September Term 1987

27,943

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH POLLIO,

Defendant-Petitioner.

ON PETITION
FOR CERTIFICATION

FILED
FEB 18 1988

To the Appellate Division, Superior Court,

A petition for certification of the judgment of A-978-86T4 having been submitted to this Court, and the Court having considered the same;

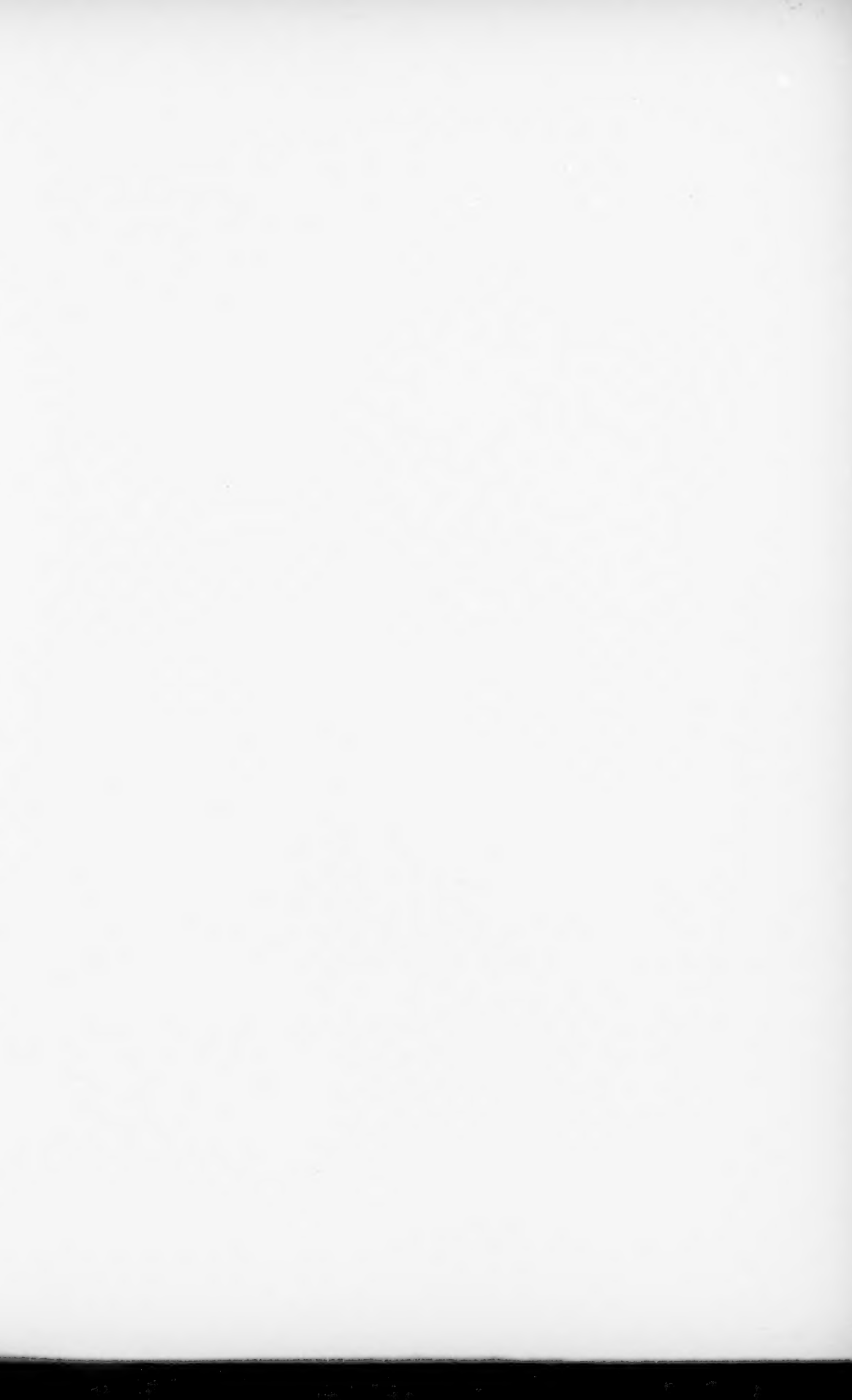
It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 17th day of February, 1988.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend
Clerk of the Supreme
Court of New Jersey

/s/ Stephen W. Townsend
Clerk of Supreme Court



②
No. 87-1740

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH P. POLLIO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

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July 27, 1988



QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have *certiorari* jurisdiction pursuant to 28 U.S.C. sec. 1257(3) to review a fact-sensitive state court decision that is merely a correct application of a state court rule in a case where no federal constitutional claims were ever squarely presented or decided?

2. Assuming that a federal constitutional claim was raised in the state courts, is the federal constitutional right to a trial by an impartial jury, guaranteed by the Sixth Amendment, offended when a state court judge properly discharges a deliberating juror, substitutes an undischarged alternate after ascertaining that the alternate had not discussed the case, and instructs the reconstituted jury to set aside prior deliberations, begin deliberations anew and disregard any impact of the discharged juror?

PARTIES BELOW

All parties below are parties to this petition.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-1740

JOSEPH P. POLLIO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ Of Certiorari To The
Superior Court Of New Jersey,
Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New Jersey respectfully requests that this Court deny the petition for writ of *certiorari*, seeking review of the opinion of the Superior Court of New Jersey, Appellate Division, in this case. That opinion has not been reported and is reprinted in the appendix to the petition at pp. 1 to 3.

OPINIONS BELOW

Respondent concurs with the statements set forth in the petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 *U.S.C.* sec. 1257(3). (Pet. 2). However, because the state court judgment to which *certiorari* is sought did not decide that case on the basis of a claimed federal constitutional right, 28 *U.S.C.* sec. 1257(3) cannot be invoked to confer jurisdiction on this Court.

STATUTE INVOLVED

28 *U.S.C.* sec. 1257. State courts; appeal; *certiorari*

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of *certiorari*, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

Petitioner was indicted on October 3, 1985, for first degree aggravated sexual assault, second degree sexual assault and third degree criminal restraint as proscribed, respectively, by *N.J. Stat. Ann.* 2C:14-2a(6); 2C:14-2c(1), and 2C:13-2a. Trial was commenced on May 7, 1986, and the jurors heard testimony on May 8, 12, 13 and the morning of May 14, 1986. It was established by the State of New Jersey, through the testimony of the female victim and eyewitnesses who heard the victim's screams and came to her assistance, that after a casual evening of dancing and drinking, petitioner ripped off the woman's clothes and sexually assaulted her in his automobile; the victim's physical resistance was to no avail, but her screams, whenever petitioner removed his hand from her mouth, and her honking of the car horn eventually attracted the attention of two nearby residents who were able to stop the attack. (Trans. of May 12, 1986, at T13-13 to 20; T14-2 to 23; T15-19 to 23; T16-19 to 17-14; T17-15 to 18-23; T19-12 to 22-19; T22-23 to 23-1; T23-22 to 25-23; T26-3 to 19; T28-11 to 15; T130-14 to 24; T131-17 to 132-24; T133-8 to 137-6; T137-17 to 138-11; T177-6 to 7; T178-23 to 180-20; T181-1 to 183-11).

At the beginning of trial, all 14 empaneled jurors were instructed not to associate with any of the parties, attorneys, or witnesses involved in the trial and not to begin discussions among themselves until the jury panel retired to deliberate. (Trans. of May 7, 1986, at T14-13 to 17-15). The court reiterated these admonitions throughout the trial. (*E.g.*, Trans. of May 7, 1986, at T22-6 to 22; Trans of May 8, 1986, at T81-1 to 6, T160-7 to 18, T161-9 to 162-6; Trans. of

May 12, 1986, at T209-12 to 210-4; Trans. of May 13, 1986, at T240-7 to 21; Trans. of May 14, 1986, at T126-9 to 23). For jury deliberations, two alternates were randomly selected and instructed not to discuss the case with anyone. (Trans. of May 14, 1986, at T156-13 to 23; T160-16 to 161-19). The alternates were thereafter present for any subsequent substantive proceeding involving the court and the jury. (See Trans. of May 14, 1986, at T162-2 to 7, T164-17 to 20; Trans. of May 15, 1986, at T4-4 to 5, T9-25 to 10-2, T12-23 to 25). The court also repeatedly ordered the deliberating jurors not to continue deliberations outside the jury room or discuss the case with anyone else. (Trans. of May 14, 1986, at T165-16 to 168-2; Trans. of May 15, 1986, at T10-12 to 11-14, T15-17 to 17-4).

On the morning of May 16, 1986, before the jurors were to continue their deliberations, defense counsel informed the court that on the evening of May 15, 1986, at a bowling alley, a juror approached Robert Susser, a partner from his office, and said he wanted to ask a legal question. (Trans. of May 16, 1986, at T2-3 to 14). Susser's impression was that the juror wanted to engage in a discussion with him, and the juror simply "smiled" when the attorney inquired if the juror was sitting on a rape case in Monmouth County. (*Id.* at T12-14 to 21). The attorney ended all communication by stating that his office was representing the defendant in that case and there should be no discussion. (*Id.* at T2-21 to 3-4). Another named partner of defense counsel's firm, having also heard the details of the incident from Susser, also appeared before the court; he told the court that the juror was more than "inquisitive" and opined that the incident

"certainly . . . would have an effect on the way the man is thinking." (*Id.* at T3-8 to 4-24). The State requested a *voir dire* of the juror because of the violation of the court's order and the relationship between the juror and the defense attorney's law partner, and also requested that the juror be removed and an alternate selected. (*Id.* at T5-2 to 6-25). The court felt obliged to *voir dire* the juror. (*Id.* at T7-1 to 3). Petitioner's position was that the juror should be disqualified if there is a *voir dire*, that he does "want an alternate in there," but that he also wanted a declaration of mistrial because the entire jury may be "tainted." (*Id.* at T7-4 to 8-21). Upon *voir dire*, the juror testified that he played in the same bowling league as Susser and Susser's father; that he knew Susser was an attorney, but that he did not know, until Susser told him, that Susser was associated with the defense firm; that there were no "inquiries" made by him with respect to "the particular case," in that the juror only said "could I ask you a question" and Susser stopped the conversation, and that the fact of the professional relationship between the defense attorney and a member of the juror's bowling league would not affect his "ability to decide this case on the evidence." (*Id.* at T9-15 to 10-19, T14-20 to 16-1).

Nevertheless, the court exercised its judicial discretion to excuse the juror. (*Id.* at T20-4 to 6). The court concluded that the juror violated an order reiterated many times and based this conclusion on the fact that the juror approached a lawyer he knew and asked a question in such a manner that the lawyer was immediately prompted to inquire whether the juror was sitting on a rape case in Monmouth County.

(*Id.* at T18-5 to 23, T19-21 to 20-2). The court also was troubled by the fact of the relationship between a member of the juror's bowling league and defense counsel. (*Id.* at T19-4 to 8, T20-2 to 4). The court decided to excuse the juror and also denied defendant's motion for a declaration of mistrial for the same reasons. (*Id.* at T20-4 to 25). The juror was thereupon excused. (*Id.* at T21-23 to 22-7).

After ascertaining on the record that the two alternate jurors did not discuss the case, the court had one alternate selected at random to become part of the jury. (*Id.* at T22-14 to 23-8). In accordance with New Jersey Court Rule 1:8-2(d), the court instructed the jurors to "set aside and disregard your past deliberations" (*id.* at T24-15 to 17), begin deliberations anew, as if entering the jury room for the first time after hearing the jury charge (*id.* at T24-17 to 20), and "eliminate any impact Juror No. 4 may have had on your deliberations and consider the evidence in the context of a full and complete deliberations with a new member of your jury." (*Id.* at T24-22 to 25-1). Approximately two hours later, the jurors returned their unanimous verdict convicting petitioner of second degree sexual assault and third degree criminal restraint. (*Id.* at T25-7 to 8; 7T26-1 to 21).¹

On appeal of his convictions to the Superior Court of New Jersey, Appellate Division, petitioner argued as to this issue that the trial court abused its discretion in substituting the alternate juror and refusing

¹ Respondent notes that petitioner's exact time notations circumscribing the jurors' deliberations are not reflected with such specificity in the transcript record of the state court proceedings. The times set forth are not inconsistent with the record, however. Hence, respondent has no serious dispute as to these times.

to declare a mistrial. (Pet. at p. 2a). The Appellate Division determined petitioner's contentions to be "clearly without merit." (Pet. at p. 2a). The appellate court further commented that it was "entirely satisfied that the judge properly exercised his discretion in excusing the sitting juror," and that it was "convinced that the judge conscientiously exercised his discretion by denying defendant's request for a mistrial and substituting the alternate for the sitting juror." (Pet. at pp. 2a, 3a).

In his petition for certification filed in the Supreme Court of New Jersey, petitioner claimed that the juror substitution produced an "unjust result," that *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), and *State v. Corsaro*, 107 N.J. 339, 526 A.2d 1046 (1987), compel a result different from that reached by the Appellate Division, and that the Appellate Division misread *Corsaro* on the "fact sensitive" issue of juror substitution. (Pet. Certification, at pp. 3 to 15). By order filed February 18, 1988, the Supreme Court of New Jersey denied the petition for certification.

Petitioner subsequently sought bail pending his petition for *certiorari*; this application, addressed to Supreme Court Justice William J. Brennan, Jr., was denied on April 15, 1988. Petitioner's petition for writ of federal habeas corpus, filed on May 19, 1988, is currently pending in the United States District Court, District of New Jersey.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court is without jurisdiction to grant *certiorari* because to the extent a Sixth Amendment question is raised in the petition, this issue was neither presented to, nor decided by, the state courts as a federal constitutional question.

The questions expressly set out by petitioner at page i of his petition for *certiorari* quite candidly reflect the ultimate questions raised in the state courts in reliance upon three Supreme Court of New Jersey opinions and a court rule. The petition itself arguably seeks to raise a Sixth Amendment claim. (Pet. at pp. 2, 5-6, 13). Indeed, petitioner claims "that the juror substitution in this case violated defendant's federal constitutional guarantee of the right to a fair and impartial trial by jury." (Pet. at p. 13).

It is also clear, however, that petitioner has never raised his complaint in the state courts in federal constitutional terms, and the state courts did not decide a federal question. Hence, whether viewed as a jurisdictional defect or a prudential restraint on this Court's exercise of *certiorari* jurisdiction, petitioner's failure to present his claim to the state courts in federal constitutional terms requires denial of the petition.

"[J]urisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981); accord, *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988). This Court has acknowledged it is "unsettled" whether the

“ ‘not pressed or passed upon below’ ” rule is jurisdictional, *Webb v. Webb*, 451 U.S. at 501-02 (“Because petitioner failed to raise her federal claim in the state court proceedings and the [state] Supreme Court failed to rule on a federal issue, we conclude we are without jurisdiction in this case”), or prudential. *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1651. However, for reasons of comity and the need for a fully developed state court record, including a reasoned opinion on the merits, the “minimum” requirement for exercise of *certiorari* jurisdiction is that “there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.” *Webb v. Webb*, 451 U.S. at 501. Petitioner bears the burden of establishing the jurisdiction of this Court. *Michigan v. Long*, 464 U.S. 1032, 1042 n.8 (1983). Indeed, by rule of this Court, a petitioner seeking *certiorari* review of a state court judgment must specify at what point in the proceedings the federal question sought to be reviewed was raised, as well as the manner and method of raising the claim and the way in which the state court passed upon the issue “to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of *certiorari*.” *Sup. Ct. R.* 21.1(h).

The state court record does not support a conclusion that the federal Sixth Amendment question was raised and/or passed upon in the state courts. As earlier noted, petitioner alleged to the Superior Court, Appellate Division, that the trial court abused its dis-

cretion under *N.J. Ct. R. 1:8-2(d)* in discharging the juror and thereafter substituting an alternate during deliberations, in lieu of declaring a mistrial. (Petitioner's brief to App. Div. at pp. 41-47). Petitioner cited *State v. Trent*, 79 N.J. 251, 398 A.2d 1271 (1979) (failure to instruct jurors, after juror substitution, to begin deliberations anew is reversible error), in support of his factual contention that notwithstanding the strong admonitory instructions to this effect, the amount of time eventually spent reaching the verdict indicated no possibility of new deliberations. Petitioner in a supplemental letter relied upon *State v. Corsaro*, 107 N.J. 339, 526 A.2d 1046 (1987) (holding that in the unusual factual circumstances of that case—where partial verdicts on inter-related charges indicating preliminary fact-finding regarding the still “open” charges were already returned when a juror was discharged and an alternate selected—substitution pursuant to *N.J. Ct. R. 1:8-2(d)* was “plain error”). Petitioner did not alert the Appellate Division to a claim of federal constitutional dimension. Indeed, a review of petitioner's argument reveals only one reference to a “right to a jury trial.” (Petitioner's brief to the App. Div. at p. 47). It is not clear that this brief allusion was intended to constitute a constitutional claim and it is equally unclear whether petitioner was referring to a state or federal “right.” See *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1650. The Appellate Division opinion surely does not reflect the determination of a federal question. (Pet. at pp. 1a to 3a).

Nor does the petition for certification support a finding that petitioner raised the issue in the state supreme court. In his application to the state supreme

court, petitioner acknowledged that the court rule was held constitutional in *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978) (where the state supreme court concluded that the substitution rule “does not offend our constitutional guaranty of trial by jury”), and merely sought to place his case factually within the *Miller* proviso that in some circumstances the presumption that the reconstituted jury adhered to admonitory instructions to begin deliberations anew may be untenable.

Accordingly, it must be concluded that petitioner has failed to establish that *certiorari* jurisdiction should be exercised in this case. He has not pressed upon the state courts a Sixth Amendment claim; nor does the final state court judgment implicate a federal question. 28 U.S.C. sec. 1257(3). Respondent urges this Court to deny *certiorari* herein.

2. The state appellate court fully considered the issues raised by petitioner and correctly applied the law of New Jersey.

The Superior Court, Appellate Division, correctly applied the applicable state law, that is, the court rule and *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), in concluding that the trial court did not abuse its discretion in discharging a deliberating juror, substituting an undischarged alternate after ascertaining on the record that he had not discussed the case, and forcefully instructing the jurors to reject all prior deliberations and to begin deliberations anew. See N.J. Ct. R. 1:8-2(d). That the jurors followed the instruction is apparent, especially since the evidence of petitioner’s guilt—to which he had interposed the defense of denial that any sexual activity, assaultive or not, occurred—was overwhelming and the reconsti-

tuted jury deliberated slightly more than two hours on the charges. Two hours cannot be considered evidential of non-renewal of deliberations as it was long enough to assess credibility and make factual determinations arising from a non-complex trial involving three and one-half days of testimony. The state court's appellate determination in this regard, therefore, does not implicate an issue of substance for this Court to decide. The state court judgment is a simple application of New Jersey precedent that is not inconsistent with legal principles developed by other courts. See *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 107 S. Ct. 421 (1986), reh'g denied, 107 S. Ct. 912 (1987); *United States v. Hillard*, 701 F.2d 1052 (2d Cir. 1983), cert. denied, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 459 U.S. 906 (1982); *Perry v. State*, 255 Ga. 490, 339 S.E.2d 922, 924-25 (1986); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909, cert. denied, 474 U.S. 1022 (1985); *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982).

CONCLUSION

Respondent submits that the petition for *certiorari* must be denied because of petitioner's failure to raise a federal question in the state courts. In any event, the judgment of the Superior Court, Appellate Division, does not warrant review because it was merely a correct application of controlling state law on a fact-sensitive issue.

Respectfully submitted,

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DATED: JULY 27, 1988